No. 460

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

THE FALK CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR
The Independent Union of Falk Employees, Intervener.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement	2-8
Summary of Argument—	
I. The Court below, on the Record presented to it, had jurisdiction to modify the order of the Board as to the disestablishment of the Independent, and to change that part of the Board's order providing that the Independent should not appear on the ballot in an election to be held in the future	8, 9-11
II. The Court below did not pass upon the direction of election, but modified the order of the Board pertaining to the unfair labor practice proceeding	8, 11-13
III. There is no provision in the Act that gives the Board the right to permanently disestablish the Independent	8, 13-24
Argument	9-24
Conclusion	25

CASES CITED.

	Page
Consolidated Edison Co., 305 U. S. 197, 236	24
Ford Motor Co. vs. National Labor Relations Board, 305 U. S. 364, 373	12, 13
International Brotherhood of Electrical Workers vs. National Labor Relations Board, 105 Fed. (2) 598	20
National Labor Relations Board vs. Fansteel Metallurgical Corp., 306 U. S. 240	15, 19
National Labor Relations Board vs. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, No. 253 of the present Term	10
National Labor Relations Board vs. Newport News Shipbuilding & Dry Dock Co., No. 20 of this Term, Vol. 7 of U. S. Law Week, p. 527, November 14, 1939 issue	23
National Labor Relations Board vs. Pacific Greyhound Lines, Inc., 303 U. S. 272	15, 18
National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261	15, 17, 18
Texas & New Orleans R. R. Co. vs. Brotherhood of Railway Clerks, 281 U. S. 548	14, 15, 16, 21
Texas & New Orleans Ry. Co. vs. Brotherhood of Ry. Clerks, 33 Fed. (2) 13, 17	17, 22
Texas & New Orleans Ry. Co. vs. Northside Ry. Co., 276 U. S. 475	17

STATUTES CITED.

	Page
Section 240 (a) of Judicial Code	2
National Labor Relations Act, Chap. 372, 49 Stat. 449, 29 U. S. C. Sec. 151, et seq.	17
National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Supp IV, Sec. 158 et seq.	2, 27
National Labor Relations Act,	
Section 1	19, 27
Section 2 (5)	27
Section 7	19, 24, 27
Section 8	27
Subsection (1)	2, 3, 17, 28
Subsection (2)	2, 3, 17, 28
Subsection (3)	2, 3
Subsection (5)	2, 3, 10
Section 9 (a)	3, 23
Section 9 (c)	6, 9, 14, 17, 28
Section 9 (d)	9, 10, 28
Section 10	10
Subsection (c)	9, 13, 29
Subsection (e)	2, 29
Subsection (f)	29, 30

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OPINIONS BELOW.

The first opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 1198) is reported in 102 F. (2d) 383, and the second opinion (R. 1208) in 106 F. (2d) 454. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1165-1181) are reported in 6 N. L. R. B. 654.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered July 13, 1939. The petition for a writ of certiorari was filed on October 12, 1939, and was granted on November 13, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED.

The relevant parts of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 et seq.) deemed to have an important bearing on the questions involved are set forth in the Appendix.

STATEMENT.

Hereafter, the National Labor Relations Board will be referred to as "The Board"; the National Labor Relations Act will be referred to as "The Act"; the Independent Union of Falk Employees, a corporation, will be referred to as "The Independent."

The Board, pursuant to a charge, and an amended charge, filed by the Amalgamated Association of Iron, Steel and Tin Workers of North America, issued its complaint and notice of hearing (R. 18, 19, 20 and 21).

The complaint, in substance, alleged that respondent was guilty of unfair labor practices, within the meaning of Section 8 (1), (2), (3) and (5) of The Act.

At the time of the filing of the amended charge, a petition was filed requesting the investigation of a question concerning the representation of respondent's employees asserted to have arisen under Section 9 (c) (R. 13 and 14).

The Board ordered an investigation in this proceeding, and, thereafter, as permitted by its rules, The Board ordered that the "unfair labor practice" proceeding and the "representation" proceeding be consolidated for the purpose of a hearing (Board Exhibit "2").

The Independent filed a petition with The Board asking leave to intervene as a party in this consolidated hearing, and participated in the hearing by counsel, on receiving permission so to do (R. 26).

The Trial Examiner filed an Intermediate Report, finding that Respondent had violated Section 8 (1), (2) and (3) of the Act.

The Trial Examiner found that Respondent did not violate Section 8 (5) of the Act.

Section 8 (5) of the Act has to do with the refusal to bargain collectively with representatives of its employees, subject to provisions of Section 9 (a).

Exceptions were filed to these Findings by the Independent (R. 1161-1164).

An oral argument was heard by the Board on these Exceptions (R. 1165).

On April 18, 1938, the Board issued its Decision (R. 1166-1179), Order (R. 1180) and Direction of Election (R. 1181).

As a part of the Board's Decision, designated as "The Remedy," the Board stated (R. 1179):

> "We have found that there is a question affecting commerce concerning the representation of the respondent's employees. We shall, therefore, order an election to be held among the employees of the respondent, who were in its employ during the payroll period immediately preceding our Direction of Election in order to determine the appropriate bargaining unit or units and the representation of employees within such unit or units. We shall direct

that such election be held upon our further order after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order. In such election we shall make no provision for the designation of the Independent on the ballot."

In its order, the Board directs that The Falk Corporation cease and desist:

"(a) From dominating or interfering with the formation or administration of the Independent Union of Falk Employees, or any other labor organization of its employees, and from contributing support to the Independent Union of Falk Employees or to any other labor organization of its employees;

(b) From in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection."

It further provides that the Respondent take such affirmative action, as the Board finds will effectuate the policies of the Act, to-wit:

"(a) Withdraw all recognition from the Independent Union of Falk Employees as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely disestablish the Independent Union of Falk Employees as such representative;"

Subsection (b) provided for the posting of notices that The Falk Corporation would cease and desist from doing the things provided in paragraph (a).

In that part of the Board's Decision styled, "Direction of Election," the Board directs, among other things (R. 1181):

> "Directed that, as part of the investigation authorized by the Board to ascertain representatives for the purpose of collective bargaining with The Falk Corporation, Milwaukee, Wisconsin, an election by secret ballot shall be conducted within such time as we may hereafter direct, under the direction and supervision of the Regional Director for the Twelfth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations (1) among the employees of said Company, exclusive of supervisory employees, draftsmen, employees in the general office, employees in the pay-roll department, powerhouse employees, and steam-driven locomotive crane operators, who were in the employ of the Company during the pay-roll period immediately preceding this Direction of Election, excluding those who since have voluntarily quit or have been discharged for cause, to determine whether or not they desire to be represented by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1528, affiliated with the Committee for Industrial Organization, for the purposes of collective bargaining."

Subsection (2) provided for an election between the Amalgamated Association of Iron, Steel and Tin Workers of North America, and the International Union of Operating Engineers, by the employees of the powerhouse and steam-driven locomotive crane operators.

A petition by the Board was filed with the Seventh Circuit Court of Appeals, to enforce the Order of the Board (R. 1-6).

The Independent filed a petition with the Court asking leave to intervene in the proceeding "to assure a full and complete hearing of said petition filed by the Board, and for the further reason that the National Labor Relations

Board seeks to deny to the members of said Independent Union of Falk Employees rights guaranteed to them by the National Labor Relations Act" (R. 1194). Leave to intervene was granted by the Court (R. 1197).

It is important that the Court have in mind the fact that the Board ordered an investigation concerning the representation of the Falk Corporation's employees, asserted to have arisen under Section 9 (c) of the Act, and that the Board authorized its Regional Director at Milwaukee, Wisconsin, to provide for an appropriate hearing upon notice (Board Exhibit 1, on file with the Clerk). The Board, thereupon ordered that the "unfair labor Practice" proceeding and the "representation" proceeding, under Section 9 (c), be consolidated for the purpose of the hearing (Board Exhibit No. 2, on file with the Clerk).

An examination of the Record will clearly show that the Independent, as constituted herein, meets with all of the requirements of the Act, as a bargaining agent for employees of respondent. It is a corporation incorporated under the laws of the State of Wisconsin; its business and purpose, as set out in its Articles of Incorporation, are as follows (R. 1111):

> "3. That the business and purpose of said corporation shall be to aid its members in becoming more skillful and efficient workers; the promotion of their general intelligence; the elevation of their character; the regulation of their wages, their hours, and conditions of employment; the protection of their individual and collective rights in the prosecution of their employment; the raising of funds for the benefit of sick, disabled or unemployed members, or the families of deceased members; and for such other lawful object, or objects, for which working people may combine, having in mind the mutual aid and protection of its members, and including the right to act as the representative of its members in entering into contracts with their employer, for the purpose of collective bargaining."

Its officers are a President, Vice-President, Secretary and Treasurer, and a Board of Directors of thirteen (13) members. Its officers are elected for a period of one year (R. 1111). The Directors are elected by members of the corporation (R. 1112). The Board of Directors act as the representatives of the members in all negotiations with the respondent for the purpose of collective bargaining, affecting conditions of employment and regulation of wages, or hours, or other mutual aid or protection (R. 1113). It is governed by by-laws, which provide for an annual election of officers, and monthly meetings of the members. Monthly dues, together with an initiation fee are provided (Independent's Exhibit No. 2).

There had been several meetings of the members of the organization up to the commencement of these proceedings (R. 1067). Dues had been paid. Counsel had been retained to represent it in these proceedings (R. 1066).

The following is a brief summary of how the Independent came into existence:

A meeting of Falk employees was called on April 18, 1937, at a public hall (R. 1101). Mr. Frank P. Burke, one of the attorneys for the Intervener, attended this meeting and answered questions pertaining to the Act, and the right of employees to form an organization of their own. Nothing was accomplished at this meeting (R. 1022-1023). It was, as expressed by one in attendance, a "flop" (R. 1056).

After the meeting, one Fred Wilson asked Mr. Burke what was necessary to incorporate an organization (R. 1063). Upon being informed that three men might incorporate an organization (R. 1064), Mr. Wilson and two other men volunteered to be incorporators. These three men went to Mr. Burke's office the following day and signed the necessary incorporation papers (R. 1064).

Thereafter, and on April 24, 1937, a meeting was called by the incorporators of all who had signed applications, and

those intending to do so (R. 1109). At this meeting, those present, who were members of this organization, elected directors, who, in turn, elected the officers of the corporation (R. 1026-1027).

The Board of Directors act as the bargaining committee.

This Board of Directors is elected by the members.

The corporation is self-sustaining.

Provision is made for annual election of officers, including directors.

Summary of Argument.

The Board, in its Brief, states two different points, with many subdivisions. We feel that all may be reduced to the following propositions:

I. **The Court below, on the Record presented to it, had jurisdiction to modify the order of the Board as to the disestablishment of the Independent, and to change that part of the Board's order providing that the Independent should not appear on the ballot in an election to be held in the future.**

II. **The Court below did not pass upon the direction of election, but modified the order of the Board pertaining to the unfair labor practice proceeding.**

III. **There is no provision in the Act that gives the Board the right to permanently disestablish the Independent.**

ARGUMENT.

I.

The Court below, on the Record presented to it, had jurisdiction to modify the order of the Board as to the disestablishment of the Independent, and to change that part of the Board's order providing that the Independent should not appear on the ballot in an election to be held in the future.

Section 9 (c) of the Act is as follows:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives."

The Board, by its direction, consolidated the investigation concerning representation of employees with the investigation of unfair labor practice (Board Exhibit No. 1).

An order of the Board was made, pursuant to Section 10 (c), based upon facts certified following an investigation, pursuant to Section 9 (c) of the Act.

There was a petition for the enforcement of such order (R. 1-6).

The certification and record of the investigation was included in the transcript (R. 4), and so the Court had the right, in its decree, under Section 9 (d) of the Act, upon the pleadings, testimony and procedure set forth in such

transcript, to modify, or set aside, in whole, or in part, the order of the Board (Section 9 (d) of the Act).

Counsel for the Board, in its Brief, in No. 253 of the present term, *N. L. R. B. vs. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876,* a copy of which brief has been served upon us, concedes that Section 9 (d) was intended to preclude the Courts from reviewing representation investigations under Section 9, except in connection with their review of orders issued by the Board in unfair labor practice cases, under Section 10, where such orders are based upon facts certified by the Board in representation investigations under Section 9. So, if it is to be argued that the lower court, in the instant case, did review the representation matter, the Court had the jurisdiction so to do, under Section 9 (d), inasmuch as it was done in connection with the Court's review of an order issued by the Board in an unfair labor practice hearing under Section 10.

The Board, in its decision pertaining to the complaint, as filed charging the respondent with a violation of Section 8 (5), found that neither the Amalgamated or the Independent made a fair showing that either represented a majority of the employees within the appropriate unit, and stated that there was no violation of Section 8 (5) of the Act, and the allegations of the complaint to that effect were dismissed (R. 1178).

These facts were included in the transcript and constituted facts certified to the Court pertaining to the Board's findings that neither group represented a majority.

Assume, for the purpose of argument, that there had been no question of representation, and no investigation concerning it by the Board. Assume further that the Board had made the same findings and order pertaining to the unfair labor practices, and had petitioned the court for an order enforcing such order, including the disestablishment fea-

fure. Can there be any question, under these assumed facts, that the court had the power and the jurisdiction to modify that portion of the order having to do with disestablishment, by requiring that the respondent should cease to recognize the Independent, unless and until it was chosen by a majority of its employees in an election conducted, as provided for by the Act?

II.

The Court below did not pass upon the direction of election, but modified the order of the Board pertaining to the unfair labor practice proceeding.

The Board assumes that the Court below passed upon the Direction of Election, and refers to the effect of the Decree entered by the Court to substantiate its claim.

The Court below did not, by its decree, control the conduct of the election. It modified the order of the Board pertaining to disestablishment, by directing that the disestablishment should not be of a permanent nature. The order of the Court, having to do with disestablishment, is as follows (R. 1211):

> "It is further ordered that the respondent shall post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty consecutive days stating that the respondent will and does withdraw recognition of the Independent Union of Falk Employees as representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages or rates of pay, hours of employment, and other conditions of employment, and that it has, and does, completely disestablish such labor organization as such representative, and that it will not recognize it until and unless its said employees freely and of their own choice select the Independent Union as their representative to so deal with said respondent concerning said labor disputes."

The Court did not agree with the Board that the order of disestablishment should be so drastic as to preclude the Independent from appearing on the ballot at a future election. It is important to have in mind in this connection the fact that the Board, in its order of disestablishment, went to extreme by providing that the Independent, even after it has been disestablished, should not appear on a ballot as the bargaining agent of the employees of the respondent.

A careful reading of the Court's second opinion (R. 1209) does not indicate that the Court was passing upon the "coming election." The Court said (R. 1209):

> "We are, however, not merely passing on the terms of a contemplated or coming election. We have much broader and comprehensive issues to deal with. We are disposing of a labor dispute case wherein the proceedings have gone beyond mere plans by the Board for the calling of an election. We are, upon the Board's petition, disposing of a labor dispute which involved alleged interference on the part of the employer with the selection of the bargaining agent by the employees."

The Brief for the Board, at p. 28, contains this language:

> "Assuming, arguendo, that the circuit courts of appeals, in their review of orders under Section 10, may in proper cases order enforcement upon conditions which they deem to be equitable, they 'must act within the bounds of the statute and without intruding upon the administrative province.' *Ford Motor Co. vs. National Labor Relations Board*, 305 U. S. 364, 373."

This Court, in *Ford Motor Co. vs. National Labor Relations Board*, 305 U. S. 364, 373, made it clear that, the right to review being vested in courts with equity powers, may adjust the relief to the exigencies of the case, in accordance with the equitable principles governing judicial review.

This Court, at page 373, said:

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

We respectfully submit that the lower court here acted within the bounds of the statute, and without intruding upon the administrative province of the Board, and so had the right to adjust the relief to the exigencies of the case, and did so by modifying the order of the Board by making provision that the employees of respondent "shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the N. L. R. Act, the Independent Union to represent them in labor relation dealings with respondent; * * *" (R. 1211).

The lower court indicated that it was doing what this court stated it might do in the case of *Ford Motor Co. vs. National Labor Relations Board*, 305 U. S. 364, namely, meeting the exigencies of the case in accordance with equitable principles, when it said (R. 1209):

> "The final disposition of this dispute calls for determination of a very vital question, namely, the right of the employees to freely select their bargaining agency."

III.

There is no provision in the Act that gives the board the right to permanently disestablish the Independent.

The authority of the Board, in reference to hearings on unfair labor practices, is contained in Section 10 (c), and is as follows:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the com-

plaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

It will be noted that this language authorizes the Board to order *the person named in the complaint* "to cease and desist from such unfair labor practice, and to take such affirmative action, * * * as will effectuate the policies of this Act."

There is no authority in this language that gives the Board the power to order others than the person complained of to take affirmative steps to effectuate the policies of the Act.

That portion of the Act, having to do with the selection of representatives, to-wit: Section 9 (c), is as follows:

"In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

It can hardly be argued, in fairness, that this provision, having to do with the selection of representatives, gives to the Board the right to deny to the employees the right of selecting any organization or representative that such employees choose.

The Board, in its brief, at p. 16, states that:

"The simple and effective remedy of disestablishing the company dominated organization as a bargaining representative, founded upon the decision of this Court in *Texas and New Orleans R. R. Co. vs. Brotherhood of Railway Clerks*, 281 U. S. 548, was adopted by the National Labor Relations Board, following established administrative precedent, and was

approved by this Court in *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; and *National Labor Relations Board vs. Fansteel Metallurgical Corp.*, 306 U. S. 240."

In this connection, let us examine these cases.

In the case of *Texas and New Orleans R. R. Co. vs. Brotherhood of Railway Clerks*, 281 U. S. 548, a suit was brought in the District Court by the Brotherhood of Railway Clerks, and the General Chairman of its System Board of Adjustment against the Texas and New Orleans Railroad Company, and certain officers and agents of that Company, to obtain an injunction restraining the defendants from interfering with, influencing or coercing certain employees of the Railroad Company in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926. The Brotherhood had been authorized by a majority of the Railway Clerks to represent them in matters of their employment and their representatives were recognized by the Railroad Company. An application was made for an increase of wages, which application was denied, and the Brotherhood referred the controversy to the United States Board of Mediation. While the controversy was pending before the Board of Mediation, the Company instigated the formation of a union of its Clerks, and it was alleged the Company endeavored to intimidate members of the Brotherhood to withdraw from the Brotherhood and join the association.

The District Court granted a temporary injunction restraining the Company from committing the acts complained of. After the granting of the injunction, the Railroad Company recognized the Association as the representative of the Clerical employees of the Company. The Company refused to recognize the Brotherhood as a representative of its employees. In proceedings to punish for con-

tempt, the District Court decided that the Railroad Company and certain of its employees, who were defendants, had violated the order of injunction and completely nullified it. The Court directed that, in order to purge themselves of this contempt, the Railroad Company should completely disestablish the Association of Clerical Employees, as it was then constituted as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, until such time as these employees by a secret ballot taken in accordance with the further direction of the court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives. On final hearing, the temporary injunction was made permanent. The Circuit Court of Appeals affirmed the Decree, holding that the injunction was properly granted, and that, in imposing conditions for the purging of the defendants of contempt, the district court had not gone beyond the appropriate exercise of its authority in providing for the restoration of the status quo. This Court granted a Writ of Certiorari, and, in its decision, said:

> "We do not find that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act."
>
> *Texas & New Orleans R. Co. vs. Brotherhood of Ry. Clerks*, 281 U. S. 548.

A careful reading of this decision will emphasize the distinction between that case and the case now before the Court. In the *Texas & New Orleans Ry. Co. vs. Brotherhood of Ry. Clerks*, 281 U. S. 548, case, instigation of the Union was attempted after the matter had been referred to the Mediation Board, and the recognition of the Union was given after the injunction had been issued restraining the Company from recognizing it. The order of the lower court was made as a condition of purging the Railroad Company

of contempt. It was by way of restoring the status quo. The Circuit Court of Appeals for the Fifth Circuit, *Texas & New Orleans Ry. Co. vs. Brotherhood of Ry. Clerks*, 33 Fed. (2) 13, at page 17, said:

> "In dealing with the situation created by violations of the injunction, it was permissible for the court to provide for the restoration of the status quo."
>
> *Texas & New Orleans Ry. Co. vs. Northside Ry. Co.*, 276 U. S. 475.

In *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, this Court, at page 262, said:

> "The main question for decision is whether, upon a finding that an employer has created and fostered a labor organization of employees and dominated its administration in violation of Section 8 (1), (2) of the National Labor Relations Act of July 5, 1935 (chap. 372, 49 Stat. at L. 449, 29 U. S. C. A. Sec. 151, et seq.) the National Labor Relations Board, in addition to ordering the employer to cease these practices, can require him to withdraw all recognition of the organization as the representative of its employees and to post notices informing them of such withdrawal."

and at page 270:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under Section 9 (c), even though it had ordered the employer to cease unfair labor practices."

and again at page 271, said:

> "In view of all the circumstances the Board could have thought that *continued* recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Asso-

> ciation in mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. • • • There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act." (Italics supplied)

We respectfully contend that the order of the Board, affirmed by the lower Court, disestablishing the Independent, together with the posting of notices of this disestablishment, under the rule, as laid down in *National Labor Relations Board vs. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, was an appropriate way to give effect to the policy of the Act.

It will be noted that there was no order of the Board, or of the Court, preventing the association from appearing on the ballot at an election to be held in the future.

In *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.*, 303 U. S. 272, this Court, at page 273, stated:

> "The only question requiring separate consideration is whether, in a case in which the National Labor Relations Board has ordered respondent to cease certain unfair labor practices, including the domination and financial support of a company union, the facts justify its further order that respondent withdraw all recognition of the union and give appropriate notice of the withdrawal to employees."

The question of the right of the Board to order an employer to cease the *continued* recognition of an agency found to have been dominated or supported by it was the one decided in this case.

Both these *Greyhound* cases are vastly different from the situation in the instant case.

The lower Court, in this case, actually ordered the employer to cease and desist from the practice complained of,

to withdraw all recognition of the Independent Union as the representative of all or any of its employees, and to post notices to that effect (R. 1211).

The lower Court here granted all the relief sought in the *Greyhound* cases, but provided that in any election to be held in the future the employee should be free to choose any bargaining agent that he desires, including the Independent Union. All, we think, in conformity with the statement of policy as found in *National Labor Relations Act*, Section 1.

We concede that the Board has the power to order such affirmative action as will effectuate the purposes of the Act, but, as stated by this Court, in *National Labor Relations Board vs. Fansteel Metallurgical Corp.*, 306 U. S. 240:

> "The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes."

The question is not, as argued by the Board (Brief p. 16) the efficacy of the remedy of disestablishment of a Union, found to be the recipient (though it be the innocent recipient) of aid from the employer; outlawed by the Act.

The question is whether the employees shall enjoy the rights guaranteed to them in the Act by Section 7, the right of free choice, the right to form an organization of their own, or whether they shall be denied that right for all time because an Administration Board, in its discretion, has determined that the employer has been guilty of an unfair labor practice in assisting such organization.

> "Full freedom of association, self-organization, and designation of representatives of their own choosing, * * *"

as expressed to be the policy of the United States in the Act, Section 1, should mean just that—full freedom—not as expressed by the Court in the case of *International Brother-*

hood of Electrical Workers vs. National Labor Relations Board, 105 Fed. (2) 598, "a Hobson's choice," requiring the employee to select the organization that the Board places nearest the door.

The Brief on behalf of the Board states, at page 17:

> "The Independent is inevitably and permanently identified in the minds of the employees with respondent, which brought it into existence and established it as the employees' bargaining representative and an election in which the Independent appears upon the ballot will accordingly not represent a free choice of the employees uninfluenced by respondent."

It is argued at page 17:

> "The temporary period of nonrecognition required by the Court's decree cannot serve to terminate this identification."

The Court's decree states no period of non-recognition. It provides:

> "That the said employees shall remain free to choose at the coming election, or any future election, held or conducted pursuant to the provisions of the N. L. R. Act, the Independent Union to represent them in labor relation dealings with respondent" (R. 1211).

If this language is construed as changing the Direction of Election made by the Board, it must be assumed that the Court had in mind the fact that the Board had stated that an election would only be held after the Board was satisfied that the effects of respondent's unfair labor practices had been dissipated by compliance with its order (R. 1179).

It would appear that the Board was satisfied that the effects of the respondent's unfair labor practices would, at some time, be dissipated.

The Brief for the Board concedes the possibility that the Independent and the Respondent some day will be disassociated in the minds of the employees, but adds, there is no practicable means of ascertaining when this has occurred

The Board apparently felt that it could determine when that time had arrived, when it said:

> "We shall direct that such election be held upon our further order, after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order." (R. 1179)

Having in mind the fact that, for practical purposes, there has been a disestablishment of the Independent since June 1937, when The Falk Corporation agreed not to recognize it as a bargaining agent, upon the request of the Regional Director of the Board (R. 89, 91, 1044 and 1071), and further, having in mind the Findings of the Examiner (R. 1139), the Decision and Order of the Board (R. 1166), the affirmation of those Findings by the Court (R. 1206), with all the attendant publicity, is it likely that one employee of The Falk Corporation, were he given the opportunity to vote, would choose the Independent against his free will? Besides all of these occurrences, The Falk Corporation has notified the Independent by letter that it refuses to recognize it as the bargaining agent for the employees of the respondent, and has posted notices of disestablishment at its plant, in compliance with the order of the Board, and the Decree of the Circuit Court of Appeals.*

At page 32 of the Board's brief, we find this statement:

> "The model was supplied by the landmark decision of this Court in Texas & New Orleans R. Co. vs. Brotherhood of Railway Clerks, 281 U. S. 548."

With that case as a landmark, let us pace off the decision of the lower Court in this case, and see how accurately it conforms to the remedy outlined in the trial court's

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* These facts will be conceded by the Board and are impliedly admitted at p. 43 of the Board's Brief.

order, and affirmed by this Court in *Texas & New Orleans R. Co. vs. Brotherhood of Railway Clerks*, 281 U. S. 548.

We find this language in the decision of the trial court in the *Brotherhood of Railway Clerk vs. Texas & New Orleans Ry. Co.*, 24 Fed. (2) 426, at page 434:

> "It is abundantly clear that the injunction issued to prevent such violation has been completely nullified, and that a remedial order should be entered, completely disestablishing the Association of Clerical Employees, as now constituted through the action of the defendant, as representative of their fellows, and re-establishing the Brotherhood as such representative, until by proper ballot the employees, without dictation or interference, vote otherwise, * * *"

The Court further ordered reinstatement of certain employees, and the reference of the matters involved to the proper law officers of the government to determine whether a proceding for criminal contempt in the name of the United States should be begun.

The Circuit Court of Appeals, in the case of *Texas & New Orleans R. Co. vs. Brotherhood of Railway Clerks*, 33 Fed. (2) 13, affirmed the Decree made by the trial court, part of which is referred to above.

Referring now to the order of the lower Court in the instant case (R. 1210-1211):

> "It is further ordered that said respondent withdraw recognition of the Independent Union as the representative of all or any of its employees for the purpose of dealing with it, the respondent, concerning grievances, labor disputes, wages, or rates of pay, hours of employment, and other conditions of employment of labor; provided, however, that the said employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the N. L. R. Act, the Independent Union to represent them in labor relation dealings with respondent; and provided further, however, that the said employees be uninfluenced or coerced in said election by the said respondent and

that the respondent refrain from exercising any influence or coercion over the employees in their selection of said Independent Union.

Provision is made in each case for the disestablishment of the organization claimed to have been dominated. In each case the court, by its decree contemplated an election by the employees, and a recognition by the employer of the agency, so elected, as the bargaining representative.

There is another very vital reason why the Independent can not legally be permanently disestablished, and the order of the Board enforced.

The order of the Board (R. 1180) is as follows:

"2 (a) Withdraw all recognition from the Independent Union of Falk Employees as the representative of any of its employees *for the purpose of dealing with the respondent concerning grievances,* labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely disestablish the Independent Union of Falk Employees as such representative." (Italics supplied)

It would appear that the Board overlooked that portion of Section 9 (a), which is as follows:

"Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

The question presented to this Court as reported in Vol. 7 of United States Law Week, page 527, of November 14, 1939, in the case of *N. L. R. B. vs. Newport News Shipbuilding & Dry Dock Co.,* No. 20 of this Term, is, whether the Board had the power to require an employer not only to cease and desist dominating or interfering with a labor organization of its employees, but also to withdraw recognition from the organization as a representative of the employees for collective bargaining purposes.

Counsel for the Board, in arguing that the Board's order was correct, relied on a statement by this Court in

the case of *Consolidated Edison Company*, 305 U. S. 197, at 236, that:

> "the *continued* existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequential violation of the Act, whose *continuance* thwarts the purposes of the Act and renders ineffective any order restraining the unfair labor practices." (Italics supplied)

It must be conceded that there is a vast distinction between a *continued* recognition of a union found to be company-dominated, and the choosing of such an organization at an election held, after the publication of notice by the employer that he cannot recognize such organization because of the finding by the Board of domination, and, therefore, must disestablish relationship with it as a bargaining agent.

If a majority of the employees of the respondent in this case, in an election conducted by the Board, would choose the Independent as its bargaining agent, it would have to be conceded that such choice was the free choice of the men. This would be in conformity with the intent of the Act, which, by its terms, provides that an organization found to have been company-dominated need not be recognized by the employee as his voluntary choice, but, after the employee has been notified of the fact that his choice of such organization, under these circumstances, need not be a binding choice, and he then chooses the same organization, he is exercising his full freedom of choice as guaranteed to him by Section 7 of the Act.

It is well, in this connection, to have in mind the fact that, as stated herein (p. 21), the Independent has not been recognized by the employer as the bargaining agent for the employees since June 1937.

CONCLUSION.

It is respectfully submitted that the Decision of the Court below should be affirmed.

Respectfully submitted,

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Independent Union of Falk Employees.

GILES F. CLARK,
Of Counsel.

APPENDIX.

Relevant part of National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 et seq.) deemed to have an important bearing on the questions involved herein.

Findings and Policy.

Section 1. • • • • • •

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 2. "When used in this Act—

(5) "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.",

Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8. "It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in *Section 7*.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to *Section 6* (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

* * * * * *

Section 9. * * * * * *

(c) "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under *Section 10* or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

(d) "Whenever an order of the Board made pursuant to *Section 10* (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Section 10. • • • • • •

(c) "The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

(e) "The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board." • • • • • • •

(f) "Any person aggrieved by a final order of the Board granting or denying in whole or in part the

relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." • • • •

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1939.

National Labor Relations Board, Petitioner, *vs.* The Falk Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 2, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Upon charges filed by the Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge No. 1528, the Labor Board found that respondent, an employer conceded to be engaged in interstate commerce, had, in violation of the National Labor Relations Act, interfered with its employees' free right to self organization and had fostered and dominated a company union called the Independent Union.[1] Respondent was ordered to cease and desist from such interference and domination; to disestablish the company union completely, and to post notices in its plant of compliance with the Board's order. At the same time and in a proceeding consolidated[2] with the determination of the alleged unfair labor practices, the Board, also upon petition of Amalgamated, directed an election of a representative for collective bargaining on a ballot to contain the Amalgamated and the Operating Engineers—a participant in the consolidated hearing—but not the Independent.

On petition by the Board for enforcement of its order, the Court of Appeals concluded[3] that "the order of the Board is valid and . . . its petition for enforcement . . . is . . . granted." But, of its own volition, the court provided in its final order "that the . . . employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the . . . Act, the Independent Union to represent

[1] 49 Stat. 449, 452, Sec. 8.
[2] *Id.*, Sec. 9(c).
[3] 102 Fed. (2d) 383, 390.

them in labor relation dealings with respondent;" and that respondent be permitted to add to the notices in its plant the qualification that the Independent would be disestablished and unrecognized only "until and unless . . . [the] employees freely and of their own choice select the Independent Union as their representative. . . ."[4]

In its petition for certiorari, the Board contended that the court was without jurisdiction to review a direction of election and that, apart from the question of jurisdiction, the court had improperly interfered with the discretion given the Board by the Act. We granted certiorari to review these important questions.[5]

The first of the two consolidated proceedings before the Board was based upon the charge of the Amalgamated, a labor organization, that respondent had engaged in unfair labor practices contrary to Sections 8(1), (2), (3) and (5) of the Act. As already noted, the Board found respondent had interfered with its employees' free choice of a bargaining agent in violation of 8(1), (2) and (3). Because there was no clear showing that the Amalgamated then represented a majority of the employees, the Board did not sustain the charge that respondent's refusal to bargain collectively with Amalgamated amounted to an unfair labor practice under 8(5).

The second phase of the Labor Board's action was taken pursuant to Section 9(c)[6] of the Act, authorizing the Board to investigate and ascertain representatives of employees for collective bargaining. As expressly permitted by subsection (c), the Board conducted this investigation, itself a distinct proceeding, "in conjunction with a proceeding under section 10" and rendered its "Direction of Election" at the same time the order relative to the unfair labor practices was entered "under section 10." It was this "Direction of Election" that provided for inclusion on the ballot of Amalgamated (C. I. O.) and the Operating Engineers (A. F. of L.), but omitted the Independent. The election was not actually to be held until

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[4] 106 Fed. (2d) 454, 456, 457.

[5] — U. S. —.

[6] Sec. 9(c), 49 Stat. 453: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

after the Board was "satisfied that the effects of the company's unfair labor practices . . . [had] been dissipated by" compliance with the order to cease and desist and to disestablish the Independent.

When the Board petitioned the Court of Appeals for enforcement of its order against respondent, it filed a transcript of the entire consolidated proceedings held under 9(c) and 10(c).

Affirming the finding of unfair labor practices and order made by the Board under 10(c), the court considered its power to act at an end if nothing had been before it "but the terms of an election by the employees about to take place." But the court held, one judge dissenting, that it did have jurisdiction to attach a condition to the Board's order whereby Independent might become a candidate in the proposed election because it was "disposing of a labor dispute case wherein the proceedings . . . [had] gone beyond mere plans by the Board for the calling of an election" and therefore had before it "for final disposition, the matter of the selection of the bargaining agent." Having thus found jurisdiction in itself to make "final disposition . . . of the selection of the bargaining agent", the court thought it necessary so to condition the Board's order as to prevent the elimination "for all time [of] one of the candidates—the Independent Union."

Respondent and the intervening Independent (company) union here contend that the court below did not actually modify the Board's "Direction of Election", but if deemed to have done so, the modification was authorized under either Section 9(d) or Section 10(e).[7] They also support the result below on the ground that, as the court below believed, the Board was without power to keep the

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[7] "Sec. 9.

" . . .

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10.

" . . .

"(e) The Board shall have power to petition any circuit court of appeals . . . within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts busi-

company union—if purged from company influence—from the ballot in a future election to select a bargaining agent, because such proscription would impair the guarantee in Section 7 of the Act that employees may bargain collectively through representatives of their own free choice.

First. We think it apparent that the conditions attached by the court to the Board's order operated as a modification of the Board's Direction that Independent be omitted from the ballot in the coming election. In conditioning the Board's order, the court acted, as it said, "that the coming election shall be free, uninfluenced by the employer, and unhampered by any election order which eliminates [the Independent] as a contender." In effect, the court's qualification of the Board's order judicially pronounced—in advance of the election—that election methods considered "suitable" by the courts rather than by the Board must be followed. But Section 9 of the Act vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent; to this end, the Board "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Nor can authority for such anticipatory judicial control of election methods be found in Section 9(d) which permits a review only in those cases in which the Board makes an order relating to labor practices found to be unfair as a result of a prior certification of a selected bargaining agent.[8] Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not "based in whole or in part upon facts certified" as the result of an election or investigation made by the Board pursuant to Section 9(c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be

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ness, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . ."

[8] No. 70, American Federation of Labor, et al. v. Labor Board, this day decided, pp. 4, 6.

no certification of a bargaining representative and no Board order —based on a certification, has been or can be made, so as to invoke the court's powers under 9(d).

The fundamental error of the court below lay in its assumption that there was before it "for final disposition, the matter of the selection of the bargaining agent." The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted.[9] There can be no court review under 9(d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.

Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9(d).

Second. The company and Independent contend, as the court below held, that the Board's order of disestablishment—eliminating the Independent from the coming election even though purged of company influence—violates Section 7[10] of the Act which guarantees the right of employees to choose their own bargaining representatives. On this premise, they argue that under the power in 10(e) to modify orders of the Board, it was the duty of the court below to alter the Board's order of disestablishment so as to protect the right of the employees to choose the Independent if purged of company domination prior to the contemplated election.

On the contrary, the Board reached the conclusion that full protection of the employees' right freely to choose bargaining representatives required complete disestablishment effecting elimination of the Independent as a candidate. The findings of the Board, on which it reached this conclusion, in part were:

Shortly after the passage of the National Industrial Recovery Act in 1933,[11] respondent brought into being a company dominated union of its employees called the "Works Council" which functioned under company control until April, 1937. At that time, the A. F. of L. and the C. I. O. were making intensive efforts to organize respondent's employees in the face of respondent's hostility. As the campaign of the outside unions progressed, the company's

[9] No. 253, Labor Board v. International Brotherhood, et al., this day decided.

[10] Sec. 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

[11] 48 Stat. 195, 198.

personnel manager arranged, for April 12, the first of four meetings, held by Representatives of the Works Council during working hours in the company's plant hospital; in the course of these meetings there was a suggestion that the company would advance the date of a proposed wage income to influence the employees' choice of a union, and the necessity for prompt incorporation "because the C. I. O. was working in the plant" was made clear; April 18, a meeting was held off of respondent's property, but no definite form of organization was decided upon; April 20, after conferring with an attorney whom respondent's president had suggested, three employees incorporated the Independent and notified respondent that it was ready to bargain collectively for some four hundred employees; on April 23, respondent recognized the Independent as the bargaining unit for all its employees upon the statement of the three incorporators, without proof, that they represented a majority of the employees.

In summary, the Board stated that respondent had used the Independent "as a convenient weapon to prevent the exercise of its employees' rights to self-organization and collective bargaining." And the court below, in approving the findings of the Board, held that the testimony showed that the company "earnestly endeavored to prevent the unionizing of its employees and when the inevitable became imminent, it sought to dominate the formation, organization and activities of the" company union. The evidence abundantly supports the concurrent findings of the Board and the court below.[12]

From these findings the Board justifiably drew the inference that this company-created union could not emancipate itself from habitual subservience to its creator, and that in order to insure employees that complete freedom of choice guaranteed by Section 7, Independent must be completely disestablished and kept off the ballot.

Congress has intrusted the power to draw such inferences to the Board and not to the courts.[13] In order that 9(c) might be an effective means of selecting freely chosen representatives for collective bargaining as guaranteed by Section 7, the Board acted within its power in disestablishing Independent so as to bar it from consideration as an employees' representative.[14]

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[12] Cf. Illinois Cent. R. R. v. I. C. C., 206 U. S. 441, 466.

[13] Labor Board v. Greyhound Lines, 303 U. S. 261, 271; Labor Board v. Newport News Shipbuilding and Dry Dock Co., — U. S. —.

[14] Report of House Comm. on Labor, House Report No. 1147, 74th Cong., 1st Sess., pp. 17-19: "It is of the essence that the rights of employees to self-organization and to join or assist labor organizations should not be re-

Third. The court also modified the Board's order by omitting the requirement that the notices to be posted in the plant contain a statement that the company would "cease and desist" from its unlawful activities. As stated in the first opinion of the court below,[15] the purpose of the Board in requiring the company to publish notices assuring its employees that it would "cease and desist" had been "to convey to the employees the knowledge of a guarantee of an unhampered right in the future to determine their own labor affiliations." Knowledge on the part of the men that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent, which the Board found the company had done successfully in the past, was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor. But the notices as permitted by the court's modifying order not only failed to assure the men that the company would cease its unlawful and coercive practices, but—backed with the prestige of a formal court order—told the men that Independent, while in terms disestablished for the time being, was still available for selection by the employees. Thus the modified notices neither renounced the company's unlawful practices nor promised their abandonment, and left as a candidate the Independent, toward which the unrenounced unlawful activities of the company had been directed. We think the plant notices as modified by the court's order fell far short of conveying "to the employees the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations."

Other contentions of respondent have been considered and found without merit.

The court below committed error in modifying the Board's order. Accordingly, the cause is remanded to the Court of Appeals with instructions to enforce the Board's order without any modification.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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duced to a mockery by the imposition of employer-controlled labor organizations, particularly where such organizations are limited to the employees of the particular employer and have no potential economic strength."

[15] The court first affirmed the findings and order of the Board, 102 Fed. (2d) 383; it wrote a second opinion rejecting the Board's objection to the final decree embodying the disputed conditions to the Board's order, 106 Fed. (2d) 454.